




THE DIRECTOR

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

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M-09-03

MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES

FROM: Jim Nussle 
Director

SUBJECT: Guidance on implementing P.L. No. 110-329 in accordance with Executive Order 13457 on "Protecting American Taxpayers From Government Spending on Wasteful Earmarks"

On September 30, 2008, the President signed into law the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (the "Act"; P.L. No. 110-329). The Act consists of the Continuing Appropriations Resolution, 2009 (Division A), the Disaster Relief and Recovery Supplemental Appropriations Act, 2008 (Division B), the Department of Defense Appropriations Act, 2009 (Division C), the Department of Homeland Security Appropriations Act, 2009 (Division D), and the Military Construction and Veterans Affairs Appropriations Act, 2009 (Division E).

This memorandum provides instructions to departments and agencies ("agencies") on implementing the Act in accordance with the President's Executive Order ("E.O.") 13457 on "Protecting American Taxpayers From Government Spending on Wasteful Earmarks" (January 29, 2008, 73 FR 6417.).

As explained below, in implementing the Continuing Appropriations Resolution, 2009 (the "FY09 CR") agencies are legally obligated to fund an earmark only if the project, program, or grant is an earmark that meets all three of the following criteria:

(1) was in the statutory text of the FY08-enacted appropriation (including earmarks that were statutorily incorporated by reference);

(2) was of a continuing nature (rather than of a one-time, non-recurring nature); and

(3) could not be carried out by funding the earmark in the remainder of FY09 (following the expiration of the FY09 CR) if Congress ultimately decides to provide continued funding in FY09 for that earmark.

If an earmark does not meet all three of these criteria, then during the FY09 CR period an agency must only fund the earmark if the agency has itself determined that it has merit under statutory criteria or other merit-based decisionmaking.

Background

In Section 1 of E.O. 13457, the President stated that:

“It is the policy of the Federal Government to be judicious in the expenditure of taxpayer dollars. To ensure the proper use of taxpayer funds that are appropriated for Government programs and purposes, it is necessary that the number and cost of earmarks be reduced, that their origin and purposes be transparent, and that they be included in the text of the bills voted upon by the Congress and presented to the President.”

Accordingly, the President directed that:

“For appropriations laws and other legislation enacted after the date of this order, executive agencies should not commit, obligate, or expend funds on the basis of earmarks included in any non-statutory source, including requests in reports of committees of the Congress or other congressional documents, or communications from or on behalf of Members of Congress, or any other non-statutory source, except when required by law or when an agency has itself determined a project, program, activity, grant, or other transaction to have merit under statutory criteria or other merit-based decisionmaking.”

The Executive Order defines “earmark” (in Section 3) as “funds provided by the Congress for projects, programs, or grants where the purported congressional direction (whether in statutory text, report language, or other communication) circumvents otherwise applicable merit-based or competitive allocation processes, or specifies the location or recipient, or otherwise curtails the ability of the executive branch to manage its statutory and constitutional responsibilities pertaining to the funds allocation process.” Since this memorandum provides guidance for implementing the Executive Order, “earmark” as used in this memorandum has the same meaning.

The Continuing Appropriations Resolution, 2009 (the “FY09 CR”).

E.O. 13457 applies with respect to the funding that is provided to agencies by Section 101 of the FY09 CR (Section 102 through 174 do not contain any earmarks). For those programs and activities that are not funded under Divisions C, D, and E of the Act, the FY09 CR appropriates from October 1, 2008, until March 6, 2009 –

“Such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2008 and under the authority and conditions provided in such Acts, for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this joint resolution, that were conducted in fiscal year 2008, and for which appropriations, funds, or other authority were made available in the following appropriations Acts: divisions A, B, C, D, F, G, H, J, and K of the Consolidated Appropriations Act, 2008 (Public Law 110-161).”

The FY08 appropriations Acts contained earmarks in the statutory text of those Acts (this includes those earmarks that were incorporated by reference into the statutory text of an FY08 appropriations Act).

The statutory earmarks in the FY08 appropriations Acts shall be handled as follows. As is standard practice in a continuing resolution, Congress in Section 101 of the FY09 CR has provided funding for “*continuing* projects or activities.” Moreover, as is also standard practice, Congress in Section 110 has protected its prerogative in the coming months to set full-year FY09 funding levels by providing that the FY09 CR “shall be implemented so that *only the most limited* funding action of that permitted . . . shall be taken in order to provide for *continuation* of projects and activities.”

Accordingly, as is standard practice, funding under Section 101 of the FY09 CR is not available for those one-time, non-recurring projects and activities that were funded by the FY08 appropriations Acts (including those projects and activities that were set forth in the statutory text of those Acts). For this reason, FY08 statutory earmarks are not funded under Section 101 of the FY09 CR if those earmarks were for one-time, non-recurring projects and activities. In addition, since Congress has directed agencies in Section 110 to implement “only the most limited funding action of that permitted,” agencies shall not fund during the FY09 CR period those FY08 statutory earmarks that were of a continuing nature if such earmarks could still be funded in the remainder of FY09 (following the expiration of the FY09 CR) if Congress ultimately decides to provide continued funding in FY09 for those FY08-earmarked projects and activities (in other words, if an agency were to fund such FY08 earmarks during the FY09 CR period, then the agency would be infringing upon the prerogative of Congress in the coming months to set full-year FY09 funding levels). In this regard, Congress in the FY09 CR did not direct agencies to fund the FY08 statutory earmarks during the FY09 CR period.

These principles apply with even greater force to the non-statutory earmarks that were in the reports and other non-statutory materials that concerned either the FY08 appropriations Acts or the (not yet enacted) full-year FY09 appropriations bills for those activities and programs that are funded by the FY09 CR. As the Supreme Court has made clear, committee reports and other legislative history materials do not bind executive agencies. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 646 (2005) (“language contained in Committee Reports is not legally binding”); *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (“indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency”). Therefore, in accordance with Sections 101 and 110 of the FY09 CR, and with Sections 1 and 2 of E.O. 13457, agencies shall not fund earmarks during the FY09 CR period “based on language in any report of a committee of Congress, joint explanatory statement of a committee of conference of the Congress, statement of managers concerning a bill in the Congress, or any other non-statutory statement or indication of views of the Congress, or a House, committee, Member, officer, or staff thereof.” E.O. 13457, § 2(a)(i).

Instead, as the Executive Order directs, the head of each agency shall ensure that “agency decisions to commit, obligate, or expend funds for any earmark are based on authorized, transparent, statutory criteria and merit-based decision making, in the manner set forth in section II of OMB Memorandum M-07-10, dated February 15, 2007, to the extent consistent

with applicable law” and that “no oral or written communications concerning earmarks shall supersede statutory criteria, competitive awards, or merit-based decisionmaking.” E.O. 13457, § 2(a)(ii)-(iii). The Order further provides that “[a]n agency shall not consider the views of a House, committee, Member, officer, or staff of the Congress with respect to commitments, obligations, or expenditures to carry out any earmark unless such views are in writing, to facilitate consideration in accordance with section 2(a)(ii)” of the Order. E.O. 13457, § 2(b). This provision of the Order goes on to require that “[a]ll written communications from the Congress, or a House, committee, Member, officer, or staff thereof, recommending that funds be committed, obligated, or expended on any earmark shall be made publicly available on the Internet by the receiving agency, not later than 30 days after receipt of such communication, unless otherwise specifically directed by the head of the agency, without delegation, after consultation with the Director of the Office of Management and Budget, to preserve appropriate confidentiality between the executive and legislative branches.”

Finally, in the case of earmarks that would be “new starts,” the FY09 CR includes the standard continuing resolution prohibition on new starts, which is found in Section 104 (“No appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2008.”).

Divisions B, C, D, and E of P.L. No. 110-329.

The appropriations acts in Divisions B, C, D, and E of P.L. No. 110-329 include earmarks in the statutory text, including those statutorily incorporated by reference. As these statutory earmarks “are based on the text of laws,” agencies shall implement them “in a manner consistent with applicable law.” E.O. 13457, §§ 2(a)(i), 4(b).

With respect to non-statutory earmarks concerning these appropriations acts, agencies shall comply with the policy and directions set forth in E.O. 13457. Thus, “the head of each agency shall take all necessary steps to ensure that . . . agency decisions to commit, obligate, or expend funds for any earmark . . . are not based on language in any report of a committee of Congress, joint explanatory statement of a committee of conference of the Congress, statement of managers concerning a bill in the Congress, or any other non-statutory statement or indication of views of the Congress, or a House, committee, Member, officer, or staff thereof.” E.O. 13457, § 2(a)(i). Moreover, the head of each agency shall ensure that “agency decisions to commit, obligate, or expend funds for any earmark are based on authorized, transparent, statutory criteria and merit-based decision making, in the manner set forth in section II of OMB Memorandum M-07-10, dated February 15, 2007, to the extent consistent with applicable law” and that “no oral or written communications concerning earmarks shall supersede statutory criteria, competitive awards, or merit-based decisionmaking.” E.O. 13457, § 2(a)(ii)-(iii). In addition, as discussed above with respect to the FY09 CR, Section 2(b) of E.O. 13457 provides directions to agencies relating to communications from the Congress regarding an earmark.

Questions about this memorandum may be directed to OMB’s Associate Directors (and Deputy Associate Directors) or to OMB’s General Counsel.

Enclosed are copies of Executive Order 13457 and OMB Memorandum M-07-10, dated February 15, 2007.

Enclosures

- [Executive Order 13457](#) (96kb)
- [Memorandum 07-10](#) (32kb)